

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)	
)	MB Docket No. 18-8
Gray Television Licensee, LLC)	
)	CSR No. 8949-A
For Modification of the Television Market)	
For WYMT-TV, Hazard, Kentucky)	
Facility Identification Number 24915)	

**REPLY TO OPPOSITION OF DIRECTV, LLC TO
PETITION FOR SPECIAL RELIEF**

I. INTRODUCTION

Gray Television Licensee, LLC (“Gray”) hereby files this Reply to the Opposition of DIRECTV, LLC (“DIRECTV”) in the above-captioned proceeding.¹ The record amply demonstrates that WYMT-TV has satisfied all of the statutory factors justifying market modifications and that grant would further Congress’s intent that viewers in the eight “Orphan Counties” identified in the petition should receive in-state local service that fulfills their news and information needs.² DIRECTV’s claims of technical and economic infeasibility are baseless, and its claims of legal immunity from WYMT-TV’s requested relief lack any basis in law or logic. The Commission should grant the Petition without delay.³

¹ See Opposition of DIRECTV, LLC to Petition for Special Relief, MB Docket No. 18-8, CSR No. 8949-A, filed Feb. 5, 2018 (the “Opposition”); *see also* Special Relief and Show Cause Petitions, Public Notice, Report No: 0463 at 2; Gray Television Licensee, LLC for Modification of the Television Market for WYMT-TV, Hazard, Kentucky, Petition for Special Relief, filed Jan. 9, 2018 (the “Petition”). This Reply is timely filed pursuant to Sections 1.4 and 76.7 of the Commission’s rules. *See* 47 C.F.R. §§ 1.4, 76.7.

² The Orphan Counties include Bell, Floyd, Harlan, Johnson, Leslie, Letcher, Martin, and Pike Counties in eastern Kentucky. As described below, the record also confirms that 23 Kentucky counties should be excluded from WYMT-TV’s carriage market, as requested in the Petition. *See* Petition at 2 & n.3.

³ DISH Network did not file an opposition to the Petition, nor has it ever stated that carriage of WYMT-TV is technically or economically infeasible. DISH merely stated in its pre-filing coordination letter that it “does not carry WYMT-TV today in any market” and therefore, “DISH

II. WYMT-TV's Requested Market Modifications Satisfy Each of the Statutory Factors and Would Vastly Improve Service for Viewers in the Orphan Counties.

DIRECTV does not contest that WYMT-TV has fully satisfied each of the five statutory factors considered in market modification cases. The record demonstrates the station's exemplary local, in-state service to the Orphan Counties.⁴ Having produced thousands of stories covering issues of concern in the Orphan Counties over the past two years, only WYMT-TV covers the Orphan Counties with the regularity and depth that viewers in the Orphan Counties need.⁵ Indeed, events of the past two weeks once again have reinforced the importance of WYMT-TV to residents of the Orphan Counties. On February 10 and 11, devastating floods struck Eastern Kentucky, and as usual, WYMT-TV's meteorologists and reporters were on the scene providing critical life saving information for its viewers. But, also as usual, satellite subscribers could not receive this information. The outpouring of thousands of public comments supporting grant of the Petition emphatically underscore the importance of WYMT-TV's local

is not in a position to evaluate the technical or economic infeasibility of carrying WYMT-TV to additional markets outside of [WYMT's] Nielsen-assigned designated market area." *See* Petition at Exhibit G. DISH's pre-coordination letter was not submitted under penalty of perjury as required by the Commission before it can consider the pre-filing coordination letter a means of demonstrating technical or economic infeasibility. Because DISH has not made the required demonstration of technical or economic infeasibility, the Commission should make clear that its grant of the Petition applies equally to DISH as to DIRECTV. Moreover, by failing to object to the Petition, DISH waived its opportunity to oppose implementation of the result in this matter.

⁴ In each of its previous satellite market modification cases (and in the cable market modifications that preceded those), the Commission has assigned great weight to the requesting station's local service showing. *See, e.g.,* Monongalia County, West Virginia and Preston County, West Virginia, *Memorandum Opinion and Order*, FCC Docket Nos. 17-274 and 17-275 at n. 29 (rel. Feb. 7, 2018) (stating "it has become clear that detailed information about programming is extremely important in the orphan county context. Because of the reduced importance of geographic factors, programming information has increased importance in consideration of factor two, and it is essential in determining how much weight to give to factor three") ("West Virginia Market Modification Order"); La Plata County, Colorado Petitions for Modification of the Satellite Television Markets of KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV, Denver, Colorado, *Memorandum Opinion and Order*, 32 FCC Rcd 1474, 1480 n. 43 (2017) ("La Plata County Market Modification Order").

⁵ Petition at 13, 19, 24, 29, 33, 39, 43, and 48.

service to viewers in the Orphan Counties.⁶ In the past, the Commission has given “substantial weight” to “scores” or “hundreds” of public comments that supported the proposed market modification, but it has never seen anything like the deluge of comments on WYMT-TV’s behalf.⁷ When considered in conjunction with WYMT-TV’s over-the-air signal coverage of the Orphan Counties, and the FCC’s previous acknowledgement of WYMT-TV’s service to Pike, Bell, and Floyd Counties in a previous cable market modification case,⁸ the evidence in the record leaves no doubt that WYMT-TV’s local service to the Orphan Counties justifies the requested relief here.⁹

The importance of MVPD carriage of WYMT-TV to Orphan County viewers is further demonstrated by the substantial historical cable carriage the station has enjoyed in those areas and the high ratings WYMT-TV generates in the Orphan Counties.¹⁰ That Nielsen has created a special rating area for WYMT-TV that is largely composed of the Orphan Counties only further underscores that current DMA boundaries are inappropriate and that the Orphan Counties should be included in WYMT-TV’s market. For both station ratings in the Orphan Counties and historical cable carriage there, Gray’s showing in this case exceeds those the FCC found sufficient to justify granting previous satellite market modification requests.¹¹

⁶ See generally MB Docket no. 18-8. Since Gray filed the Petition, the Commission has received more than 2,000 comments from viewers in the Orphan Counties supporting the proposed modification. This is in addition to the dozens of letters from community and business leaders within the Orphan Counties submitted with the Petition. Petition at Exhibit B.

⁷ West Virginia Market Modification Order at ¶ 30; La Plata County Market Modification Order at 1486, ¶ 26.

⁸ Kentucky Central Television, Inc. Hazard, Kentucky for Modification of Station WYMT-TV’s ADI, *Memorandum Opinion and Order*, 10 FCC Rcd 3401 (1995).

⁹ There is no evidence in the record that any in-market station provides local programming to the Orphan Counties comparable to the volume or quality provided by WMYT-TV.

¹⁰ See Exhibits I, K, O, Q, S, U, X, and AA.

¹¹ See West Virginia Market Modification Order at 20 (providing that evidence of historic carriage in a market modification area is evidence that weighs strongly in favor of the requested

In short, WYMT-TV's request is precisely what Congress had in mind when it extended its market modification rules to ensure that satellite viewers have access to in-state local television service. By all the evidence – which stands entirely unrebutted by DIRECTV – the Orphan Counties should be part of WYMT-TV's satellite carriage market.

III. DIRECTV Fails To Demonstrate that Addition of the Orphan Counties to WYMT-TV's Market is Technically or Economically Infeasible.

DIRECTV entirely fails to carry its burden of demonstrating that carriage of WYMT-TV in the Orphan Counties is technically and economically infeasible.¹² Indeed, DIRECTV does not really argue that carriage in the Orphan Counties is actually technically infeasible, instead it seeks to wrongly rely on a series of legal arguments for why requiring such carriage is precluded by the rules. Each of those arguments is wrong.

First, DIRECTV claims that carriage in the Orphan Counties is *per se* technically infeasible because WYMT-TV is not currently carried on the spot-beam serving the Lexington

modification); *see also* Gray Television Licensee, LLC for Modification of the Satellite Television Market for WSAW-TV, Wausau, Wisconsin, *Memorandum Opinion and Order*, 32 FCC Rcd 668, 685 ¶ 33 (2017) (“WSAW Market Modification Order”) (stating “[t]hat WSAW has any measurable ratings at all is noteworthy, and weighs slightly in favor of the grant”); La Plata County Market Modification Order at 1498 ¶ 49, 1503 ¶ 58.

¹² Opposition at 3-7. *See also* Amendment to the Commission's Rules Concerning Market Modification, *Report and Order*, 30 FCC Rcd 10406, 10435 ¶ 38 (2015) (“STELAR Market Modification Report and Order”). There is no sound policy basis for DIRECTV's interpretation of the rule, which would prohibit a station that is not retransmitted by a satellite carrier (for example, during a lapse in carriage as the stations negotiate a retransmission consent agreement or any new station seeking carriage on a carrier for the first time) from filing a market modification request with the Commission. There are numerous reasons why a satellite operator may not carry a station and those reasons should not preclude the FCC from reviewing the merits of a proposed market modification. In this case, WYMT-TV could choose to become an independent station not affiliated with any network and eliminate any concerns about a duplicating signal. If that were the case, the station and the residents of the Orphan Counties would be forced to wait until such a change occurred and for WYMT-TV to refile this Petition. Such a result would make little sense for viewers in the Orphan Counties and place an undue burden on the FCC staff.

DMA.¹³ This reading of the *per se* exemption goes beyond anything the FCC has previously suggested and would make bad policy. While the *per se* exemption places limits on the technical feasibility of adding counties to a station's market that are outside the spot beam on which the station is carried, it says nothing about stations that are not currently carried on any of a satellite operator's spot beams. The *per se* rule was designed to ensure that stations are not required to be carried on multiple spot beams, not to deter uncarrried stations from seeking market modifications to provide service to areas outside their DMAs.¹⁴ The right reading of the rule is that because WYMT-TV is not currently carried by DIRECTV, the *per se* exemption should not apply.

DIRECTV's claim that the *per se* exclusions preclude carriage of WYMT-TV on a neighboring spot beam are similarly misguided.¹⁵ While Commission rules do consider carriage on a neighboring spot beam technically infeasible when a station is already carried on the spot beam serving the station's DMA, they say nothing about the technical feasibility of carriage on a neighboring spot beam when the station is not carried on the spot beam serving the station's DMA.¹⁶ The agency was rightly concerned with t DBS providers' spot beams by requiring carriage of a station on a spot beam serving an entire DMA and a second spot beam serving an entire neighboring DMA.¹⁷ That concern has no application here because DIRECTV does not currently carry WYMT-TV, and DIRECTV has the freedom to determine the most spectrally efficient way for it to deliver WYMT-TV to the Orphan Counties without any requirement of adding the station to both the Lexington and a neighboring spot beam. So DIRECTV's claim that the neighboring spot beam exclusion renders Gray's request technically infeasible also

¹³ Opposition at 3-4.

¹⁴ STELAR Market Modification Report and Order at 10431-432 ¶ 32.

¹⁵ Opposition at 4-5.

¹⁶ STELAR Market Modification Report and Order at 10431-432 ¶ 32.

¹⁷ *Id.*

fails.¹⁸ The failure of DIRECTV's neighboring spot beam argument is also fatal to its technical infeasibility argument. This is because DIRECTV concedes that there are spot beam scenarios apparently involving a neighboring spot beam that would be technically feasible.¹⁹

While DIRECTV seeks to portray its objection to the Petition as based on DIRECTV's legal rights, its real objection to the Petition appears to be its view that extending in-state local service to the Orphan Counties would be an "absurd result."²⁰ While DIRECTV may not care whether viewers in the Orphan Counties actually receive the news and information they need from an in-state and local source, the 2,000 viewers from those communities that support the Petition surely do not see their information needs as "absurd." What would appear absurd to them would be DIRECTV's claim that it should be able to warehouse its spot beam capacity and reserve it for the launch of future in-market multicasts or other stations, regardless of whether Kentucky viewers have access to relevant information about their communities.²¹ Since DIRECTV has conceded that it is technically feasible for DIRECTV to distribute WYMT-TV to the Orphan Counties under some spot beam scenario, the FCC should find that the requested market modification is technically and economically feasible.

¹⁸ DIRECTV further argues that the Petition seeks an infeasible result because it lacks capacity on its Lexington spot beam.

¹⁹ Opposition at 4 (stating "*virtually* any potential spot beam scenario would be infeasible"). Since there apparently is a spot beam solution that is technically feasible, DIRECTV's claim that it lacks spot beam capacity on its Lexington spot beam – even if true – is not dispositive here. Opposition at 5-7.

²⁰ Opposition at 6.

²¹ When the *per se* exemption does not apply, carriers may ask the Commission to consider technical or economic infeasibility on a case-by-case basis. STELAR Market Modification Report and Order at 10433 ¶ 33. While DIRECTV does not seek to make a case-by-case showing, the Commission should note that DIRECTV's showing would fail under that standard as well. The Senate made clear that a carrier's infeasibility claim must be "well substantiated." Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 11 (2014). The Commission has since stated that a "detailed certification submitted under penalty of perjury would satisfy the carrier's burden under the statute." STELAR Market Modification Report and Order at 10435-36 ¶ 39.

IV. Removal of 23 Central and Southern Kentucky Counties from WYMT-TV's Carriage Market Is Necessary To Reflect Market Realities.

The record also demonstrates that the Commission should delete 23 Kentucky counties from WYMT-TV's satellite carriage market.²² As demonstrated in the Petition, deletion of the Modification Counties is necessary to bring WYMT-TV's satellite carriage market into basic conformity with Nielsen's special trading area for WYMT-TV.²³ Since Nielsen created the DMAs the FCC uses to define local carriage markets in the first place, and Nielsen has determined that the proper local market for WYMT-TV includes the Orphan Counties and generally excludes the Modification Counties, it follows that the Commission should follow suit.

DIRECTV claims that Gray failed to demonstrate that removal of the Modification Counties is warranted,²⁴ but Gray has provided more than enough evidence to demonstrate that the Modification Counties are not part of WYMT-TV's market. Given the size and diversity of the Lexington DMA and the Orphan Counties, Gray has long served these areas with its two stations focused on their immediate economic markets. WYMT-TV serves Nielsen's special trading area in east Kentucky and the Orphan Counties and WKYT-TV the remaining portion of the Lexington DMA. WYMT-TV also has little or no signal coverage over the Modification Counties, essentially is not carried by cable systems, and achieves virtually no ratings in that region.²⁵ The FCC has long deemed the lack of local programming, ratings, cable carriage, and signal coverage as grounds for deleting communities from a station's signal carriage market.²⁶

²² These counties include: Russell, Casey, Lincoln, Boyle, Garrard, Mercer, Jessamine, Madison, Estill, Anderson, Woodford, Fayette, Clark, Montgomery, Menifee, Franklin, Scott, Bourbon, Bath, Rowan, Harrison, Nicholas, and Fleming (collectively, the "Modification Counties").

²³ Petition at 51-54.

²⁴ Opposition at 10 n.37.

²⁵ Petition at 51-54.

²⁶ *See, e.g.*, Petition of Tobacco Valley Communications to Exclude Eureka and Communities in North Lincoln County from the Local Market of Several Spokane, Washington Broadcasters and

DIRECTV ignores all of this evidence and instead bases its opposition to removal of the Modification Counties by attacking Gray's supposed motivations in seeking the removal.²⁷

DIRECTV fears that Gray proposes deletion of the Modification Counties as part of a nefarious plot to force DIRECTV to carry both WYMT-TV and its sister station WKYT-TV throughout the Lexington DMA.²⁸ Nothing could be further from the truth. Both WYMT-TV and WKYT-TV elected retransmission consent for the 2018-2020 election cycle, so DIRECTV cannot be forced to carry either station anywhere; it will carry one or both stations only where it agrees to do so. Moreover, if the FCC has any doubts as to Gray's intentions, Gray is more than willing to waive its mandatory carriage rights for WYMT-TV in the Lexington DMA.²⁹ WYMT-TV has no intention of exercising those rights, and DIRECTV's fears should not stand in the way of conforming WYMT-TV's carriage market to its actual, demonstrated economic market.³⁰

For the same reasons, the Commission should reject DIRECTV's meritless claim that deletion of the Modification Counties for WYMT-TV's market would deprive DIRECTV of its

Include it in the Local Market of Several Missoula, Montana Broadcasters, *Memorandum Opinion and Order*, 31 FCC Rcd 8972 (2016); Massillon Cable TV, Inc. for Modification of the Cleveland, Ohio DMA, *Memorandum Opinion and Order*, 26 FCC Rcd 15221 (2011); Comcast Cable Communications, LLC for Modification of the San Francisco-Oakland-San Jose, California DMA, *Memorandum Opinion and Order*, 26 FCC Rcd 14453 (2011); Comcast Cable Communications, LLC for Modification of the Pensacola, Florida/Mobile, Alabama DMA, *Memorandum Opinion and Order*, 20 FCC Rcd 10093 (2005); Time Warner Cable Petition for Modification of the Television market of Television Station KHIZ(TV), Barstow, California, *Memorandum Opinion and Order*, 18 FCC Rcd 20536 (2003); Clear Picture, Inc. Petition for Modification of the Market of Television Station WGGN-TV, Sandusky, Ohio, *Memorandum Opinion and Order*, 18 FCC Rcd 20271 (2003). These cases provide no support whatsoever for DIRECTV's odd claim that Gray's evidentiary showing does no more than "support[] maintaining the status quo," which the Commission should reject. Opposition at 10 n.37.

²⁷ Opposition at 8-9.

²⁸ *Id.*

²⁹ Under this proposal, Gray would retain the right to elect retransmission consent in the remaining counties in the Lexington DMA and in the Orphan Counties, but would retain mandatory carriage rights only in the Orphan Counties.

³⁰ See Gray Television Licensee, Inc., For Modification of the Harrisonburg, Virginia DMA, *Memorandum Opinion and Order*, 21 FCC Rcd 8719 (2006).

right to choose among duplicating network signals.³¹ Obviously the duplicating signals rule applies only when two stations are rightfully assigned to the same geographic market. Neither DIRECTV nor any other party has any right to have any particular county assigned to a particular station's market. That process is governed by the FCC's rules establishing a station's market as coterminous with its Nielsen DMA and the market modification procedures.³² WYMT-TV has shown that the Modification Counties should not be assigned to its market, so WYMT-TV should not be considered a "duplicating" network signal in those areas.

If DIRECTV had the rights it claims (and it doesn't), Nielsen would violate DIRECTV's rights anytime it shifted a county served by multiple network affiliates from one DMA to another and the Commission could never delete a community or county from a Station's DMA if another network affiliate was serving that area.³³ Nielsen county shifts happen routinely, and the Commission has been deleting communities from stations' carriage markets for decades.³⁴ The Commission should reject DIRECTV's claim that its "rights" to be free of carrying duplicating signals overrides the Commission's authority to establish stations' MVPD carriage markets.

³¹ Opposition at 7-11.

³² 47 C.F.R. §§ 76.55(e), 76.59

³³ Moreover, DIRECTV's duplicating signal rights apply only if one or both stations elect mandatory carriage in the relevant areas. Again, both WYMT-TV and WKYT-TV have elected retransmission consent throughout the Lexington DMA for the 2018-2020 cycle and WYMT-TV is willing to waive such rights in the Lexington DMA for future cycles. Thus, DIRECTV's asserted right to choose among duplicating signals is not implicated by this case. While WYMT-TV would retain mandatory carriage rights in the Orphan Counties, the duplicating network affiliates in the Charleston-Huntington, Tri-Cities, and Knoxville DMAs are located in different states from WYMT-TV, so the duplicating signal rule would not apply. See 47 C.F.R. §76.66(h).

³⁴ See *supra* n. 26.

V. DIRECTV's Proposed "Compromise" Would Not Serve the Interests of Orphan County Viewers.

The Commission should reject DIRECTV's proposal that in lieu of the requested market modification, it should be permitted to deliver WKYT-TV to the Orphan Counties.³⁵ As Gray demonstrated in the petition, WYMT-TV serves the Orphan Counties, whereas WKYT-TV primarily serves central and southern Kentucky. Congress amended the market modification rules to give viewers access to local, in-state programming, and WYMT-TV is the only station that provides that in the Orphan Counties. More than 2,000 viewers in the Orphan Counties have demanded that WYMT-TV be carried on satellite in their communities due to WYMT-TV's hyper-local coverage of issues of importance to the Orphan Counties. Moreover, the Commission has no authority to respond to a requested market modification for WYMT-TV by modifying the market of WKYT-TV, and DIRECTV has made no showing that such a market modification is justified.

VI. CONCLUSION

For the reasons stated herein, Gray requests that the Commission deny the Opposition and grant the Petition.

Respectfully submitted,

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February 20, 2018

³⁵ Opposition at 11-12.

CERTIFICATE OF SERVICE

I, Rayya Khalaf, hereby certify that a true and correct copy of the foregoing Reply to Opposition of DIRECTV, LLC to Petition for Special Relief was placed in first class U.S. mail, postage prepaid, except where otherwise indicated, on this 20th day of February 2018, addressed to the following:

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